the repayment by the borrower of *money lent* to him" and later says "before the money was lent". Section 16(3) speaks of "the date of the *loan*". Similarly section 17 speaks of "*loan* of money by a moneylender". The main argument by counsel for the respondent in support of the judge's decision was that the words used in the charge were "principal sum", "interest" and "money lent", which correspond with the words used in the Ordinance.

The view which we took of the appeal was that a certain amount of confusion arose in the mind of the learned judge from the two types of business which the appellants were carrying on, it being clear that no problem would have arisen if the appellants, apart from being house developers, had not been licensed moneylenders. It was abundantly clear to us that on the facts, about which there was no dispute, the transaction between the parties was one of sale and purchase of land with a house thereon. It is the nature of the agreement entered into and not its object at which the court has to look in order to decide whether in any particular case the agreement is a moneylending agreement or otherwise. (See *Olds Discount Company Limited* v. *John Playfair Limited*[3]). Notwithstanding the use of the word "lent" in the memorandum of charge, there was no evidence that there was actual payment or physical delivery of money by the appellants to the respondent in respect of the charge. The charge was purely and simply a security for the money due under the sale agreement. In other words, the transaction in question was not one entered into by the appellants in the course of their business as moneylenders. (See *Rabone* v. *Deane*[4]).

The learned judge stated in his judgment that the position in the case cited by Mr. Ronald Yeo on behalf of the appellants was quite different from the position in the instant case and that the facts in the case cited to him by Mr. S. A. Raj on behalf of the respondent were somewhat similar to the facts of the present case except that in that case a memorandum of agreement for the loan pursuant to section 16 of the Moneylenders Ordinance, 1961 was drawn and signed by the parties concerned. In our judgment, this case was practically on all fours with the case of *Poh Kim Kang & Ors.* v. *Ishak bin Lambik & Anor*,[2] which was relied on by counsel for the appellants in the court below. On the evidence before the court in that case there was no loan at all between the plaintiffs and the first defendant. We found the position to be the same in this case. Winslow J. held in that case that the question whether the plaintiffs were carrying on the business of moneylenders could not arise unless a finding was made by the court that there was a loan in the first instance. With that statement of the law we respectfully agreed.

For the reasons which we have stated we allowed the appeal, setting aside the order of the court below and substituting in its place an order in terms of the Originating Summons.

Appeal allowed.

Solicitors: *Skrine & Co.; Clough Thuraisingam & Co.*

PUBLIC PROSECUTOR v. KHOO KAY JIN

[A.Cr.J. (Chang Min Tat J.) April 12, 1973]

[Penang — Criminal Appeal No. 17 of 1973]

Criminal Law and Procedure — Discharge — When discharge should or should not amount to an acquittal — Criminal Procedure Code (S.S. Cap. 21), s. 187(1).

In this case at the trial the prosecution indicated to the court that the complainant whose motor cycle was alleged to have been stolen by the respondent had not been traced and an adjournment was requested. When the learned magistrate indicated his disinclination to grant the adjournment, the prosecuting officer suggested a discharge. The magistrate thereupon discharged him. such discharge amounting to an acquittal.

Held: (1) the case of *Koh Teck Chai* v. *Public Prosecutor*[1] refers to a case where the prosecution indicates to the court under section 187(1) Criminal Procedure Code that it does not propose to carry on with the charge and has no relevance to a case where the prosecution wants to carry on with the charge against the accused but for the moment is unable for some reason to do so;

(2) where the material witnesses are untraceable and there is no reasonable prospect of their coming forward, the prosecution should act under section 187 of the Criminal Procedure Code (S.S. Cap. 21) or enter a *nolle prosequi;*

(3) in this case the order of acquittal and discharge should be set aside and the accused be ordered to stand trial on the charge preferred against him.

Case referred to:-

(1) *Koh Teck Chai* v. *Public Prosecutor* [1968] 1 M.L.J. 166.

CRIMINAL APPEAL.

T. Selventhiranathan (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Chang Min Tat J.: The respondent was discharged, such discharge being made to amount to an acquittal when the prosecution indicated to the court that the complainant whose motor cycle was alleged to have been stolen by the respondent had not been traced.

The theft was committed on 31 May 1972 and the accused arrested on 4 June 1972. At the first appearance on 9 June 1972, the accused was charged. He claimed trial and the case set down for hearing on 5 September 1972. He was granted bail. On the day of hearing, the prosecution asked for and obtained a postponement on the ground that the complainant had not been served with a subpoena to attend. It was refixed for hearing on 16 January 1973.

On this day, the prosecution indicated that the complainant could not be traced. The magistrate then recorded that the prosecuting officer suggested a discharge not amounting to an acquittal. The Deputy Public Prosecutor went to some length to submit that that was not the exact position. The prosecuting officer had asked for a further adjournment and it was only when the magistrate showed his disinclination to grant one, that she made the suggestion for a discharge.

Defence counsel then submitted the case of *Koh Teck Chai* v. *Public Prosecutor*[1] and requested for a discharge amounting to an acquittal.

The magistrate thereupon entered a discharge and made it amounting to an acquittal.

It seems to me with every respect that *Koh Teck Chai's* case has been completely misunderstood. The learned judge in that case acted upon the information given by the police that it was probably intended to proceed against the accused by departmental action and took that to bring the case within the ambit of section 187(1) of the Criminal Procedure Code (S. S. Laws Cap. 21). This section is in these words:

187(1). At any stage of any summary trial before a magistrates court or sessions court before judgment has been delivered. *the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the defendant upon the charge and thereupon* all proceedings on such charge against the defendant shall be stayed and he shall be discharged from and of the same.

(2). Such discharge shall not amount to an acquittal unless the magistrate or president sessions court so direct except in cases coming under section 180.

It should have been perfectly clear that *Koh Teck Chai's* case was applicable only to cases where the Public Prosecutor in his discretion informed the court that he would not proceed with the prosecution. It could have no relevance in a case where the prosecution wanted to carry on with the charge against the accused but for the moment was unable for some reason to do so.

I subscribe to every single word that had been said in court that the prosecution should exert itself to ensure a speedy trial and I do think that where the material witnesses are untraceable and there is no reasonable prospect of their coming forward, the prosecution would do well to act under section 187 or enter a *nolle prosequi*. But for the purposes of the present appeal, the learned magistrate had, with respect, misunderstood the *ratio decidendi* of *Koh Teck Chai's* case and applied the wrong reasoning to the circumstances of the case.

I therefore set aside the order of acquittal and discharge and ordered the accused to stand trial in the Magistrates Court on the charge preferred against him.

Order of acquittal and discharge set aside.